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No. 05-260

In The

Supreme Court of the United States

JOEL SEREBOFF and MARLENE SEREBOFF,

Petitioners,

v.

MID ATLANTIC MEDICAL SERVICES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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2 W. Phillips, Treatise on the Law of Insurance 1723, at 397 (5th ed. 1867) 10

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REPLY BRIEF FOR THE PETITIONERS

Reduced to its essence, the position of MAMSI and its *amici* is that *Great West* should be overruled or limited. This subtle request by MAMSI and its *amici* proceeds in four parts.

First, MAMSI and its *amici* attempt to recast MAMSI's request for contract damages as a claim rooted in principles of equitable subrogation. As explained in Section I, however, MAMSI has sought contractual reimbursement in this case precisely to *avoid* the equitable principles that historically were used to govern subrogation claims. *See, infra*, pages 2-6.

Second, MAMSI and its *amici* argue that MAMSI is entitled to equitable restitution in the form of a constructive trust or an equitable lien to enforce its contractual reimbursement provision. As explained in Section II.A., however, MAMSI cannot contractually disclaim the very equitable principles that governed subrogation and then rely on the special tracing rules that were permitted by courts of equity in such cases. In making its case for equitable restitution, MAMSI and its *amici* also cite a handful of equitable lien cases. As explained in Section II.A., however, these equitable lien cases do not proceed on a theory of *restitution*. As such, they cannot be used by MAMSI to evade the requirement of tracing which was a precondition for all *restitution* claims in equity. Just as with a constructive trust, an equitable lien *based upon a theory of restitution* (*i.e.*, unjust enrichment) requires that a plaintiff trace the subject of the trust or lien back to property that was taken by the defendant from the plaintiff. This MAMSI cannot do. *See, infra*, pages 7-10.

Although never explicitly acknowledged by MAMSI or its *amici*, what MAMSI now seeks is an equitable lien *by agreement/assignment*. As explained in Section II.B.,

however, such liens were only available in equity if a plaintiff could meet an extremely strict standard. It is hornbook law that the mere promise—written or otherwise—to repay money out of a fund could never warrant this equitable remedy. To the contrary, a plaintiff had to establish that the defendant (at the time of contract) intended to relinquish control and appropriate the funds in question as security for payment of the debt. Of course, the mere acceptance of medical benefits subject to a boilerplate reimbursement provision could never satisfy such a requirement. *See, infra,* pages 11-13

Finally, MAMSI and its *amici* argue at length that various policy considerations compel the conclusion that section 502(a)(3) was intended to authorize MAMSI's claim. As explained in Section III, however, there is absolutely no legislative history or language in ERISA to support such a position. *See, infra,* pages 13-17. Moreover, as explained in Section IV, the misguided policy arguments advanced by MAMSI and its *amici* are nothing more than an attempt to overrule or limit the holding of *Great West.* This Court should decline any such invitation. Judicial modification of section 502(a)(3) based on controversial considerations of policy and purpose is particularly inappropriate given that the precise question presented by this case is currently being considered by Congress. *See, infra,* pages 17-19.

I. MAMSI HAS ASSERTED A LEGAL CLAIM FOR BREACH OF CONTRACT DAMAGES.

In its brief, MAMSI suggests that the source of its claim against the Sereboffs is the equitable doctrine of subrogation. Resp. Br. 12 ("Because the plan's position is directly analogous to that of an indemnity insurer in the subrogation context, the plan's claim, too is grounded in

equity.").[1] As explained below, this suggestion is completely unfounded.

A. MAMSI Sought Reimbursement to *Avoid* Equitable Principles of Subrogation.

The claims asserted by MAMSI in this lawsuit are predicated entirely upon a plan provision calling for reimbursement out of recoveries from third parties. Despite this obvious fact, MAMSI boldly proclaims that the "semantic distinction [between contractual reimbursement and subrogation] do[es] not in the least affect the equitable nature of the substantive remedies that the plan claims," Resp. Br. 16, because "reimbursement is 'encompassed within the concept of subrogation.'"). Resp. Br. 17 n.7 (quoting *Cont'l W. Ins. Co. v. Swartzendruber*, 570 N.W. 2d 708, 712 (Neb. 1997)). In order to appreciate the error of this reasoning, one need look no further than the very case MAMSI cites:

> Under principles of equity, an insurer is entitled to subrogation only when the insured has received, or would receive, a double payment. . . ."[A]llowing an insurer to subrogate against an insured's settlement when an insured has not been fully compensated would mean that all the insured's settlement could be applied to a medical payment subrogation claim with nothing left to compensate the insured for excess medical bills or personal injuries.". . . [E]quity requires that the insured be fully compensated before the insurer would be

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[1] The United States does not take the position that MAMSI's claim is based on principles of equitable subrogation. Nonetheless, the Solicitor General relies—almost exclusively—on a series of equitable subrogation cases in an effort to maintain that MAMSI satisfies the tracing requirements required for imposition of a constructive trust or an equitable lien on the settlement funds at issue. U.S. Br. 15-19.

> allowed to seek reimbursement from settlement proceeds. . . .

Id. (citations omitted).

MAMSI itself notes that "[t]he right of subrogation is not founded on contract. *It is a creature of equity*; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties." Resp. Br. 19 n.11 (emphasis in original). At the same time, however, MAMSI has consistently taken the position that ***only the contract terms*** are relevant in determining whether—and to what extent—MAMSI is entitled to reimbursement. In the words of the Solicitor General:

> The theory of respondent's action under Section 502(a)(3) is that $74,869.37 of petitioners' recovery from third parties belongs in good conscience to the plan, ***because petitioners were obligated by the plan's terms to reimburse the plan from the recovery.***

U.S. Br. 28 n.13 (bold emphasis added).

B. The District Court Granted Summary Judgment on the Contract and Refused to Consider Any Equitable Factors.

"[W]hile '[a] right of true [equitable] subrogation may be provided for in a contract . . . the exercise of the right will . . . have its basis in general principles of equity rather than in the contract, which will be treated as being merely a declaration of principles of law already existing.'" *Wasko v. Manella*, 269 Conn. 527, 849 A.2d 777 (Conn. 2004)

(quoting 83 C.J.S. Subrogation 3(b) (1953) (footnote omitted)).[2]

If the object of this lawsuit was truly equitable relief grounded in principles of subrogation, the district court would have considered equitable factors such as (1) whether (and to what extent) the tort settlement constituted a double payment;[3] (2) whether (and to what extent) the tort settlement left the Sereboffs under-compensated for their injuries;[4] and (3) whether (and to what extent)

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[2] This Court need not determine whether § 502(a)(3) permits a plan fiduciary to seek a constructive trust or equitable lien on monies obtained by a beneficiary who has allegedly impaired the plan's equitable subrogation rights. MAMSI has not pursued such a theory. Petitioners acknowledge that such a case would present a closer question. Although such relief might constitute "equitable restitution," it would likely not serve to "redress [] violations [or] enforce. . . ***the terms of the plan***." 29 U.S.C. § 1132(a)(3)(B) (emphasis added). In any event, if the Court determines that MAMSI can pursue such a claim, remand is required to address the issue of impairment and other equitable factors that were never considered.

[3] *See, e.g. Sutton v. Jondahl*, 532 P.2d 478, (Okla. App. 1975) (denying a landlord's insurer the right of equitable subrogation and noting that "[t]he principle of subrogation was begotten of a union between equity and her beloved—the natural justice of placing a burden of bearing a loss where it *ought to be*. Being so sired this child of justice is without the form of rigid rule of law. On the contrary it is a fluid concept depending on the particular facts and circumstances of a given case for its applicability. To some facts subrogation will adhere—to others it will not.") *Id.* at 481-82.

[4] *See, e.g., Wimberly v. American Casualty Company*, 584 S.W.2d 200 (Tenn. 1979) (denying conventional subrogation to insurers that had paid $15,000 to insured because insured's total loss was $44,619 and total recovery from the tortfeasor was only $25,000); *Frost v. Porter Leasing Corp.*, 436 N.E. 2d 387, 390 (Mass. 1982) (denying equitable subrogation and noting that "when subrogation is based on broad principles of equity and efficiency, rather than on the contract of the parties, isolation of medical expenses is artificial, and the accident victim's position should be viewed a whole.").

MAMSI's lack of participation in the settlement should eliminate or reduce its right to recover from the Sereboffs.[5]

To be clear: Petitioners raised these arguments with both the district court[6] and court of appeals.[7] Although these claims were never controverted by MAMSI, the district court considered them immaterial "because the plain language of the plan indisputably requires reimbursement under the circumstances." Pet. App. 31a. Similarly, the Fourth Circuit concluded that "the disputed funds belong in good conscience to MAMSI [merely because t]he Plan contains express, unambiguous reimbursement provisions, according MAMSI the 'right to recover ***any*** payments' made to the Sereboffs by a third party." Pet. App. at 11a (emphasis added).[8]

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[5] "[W]hen the plaintiff asserts an equitable remedy, equitable defenses can be invoked even if they could not be invoked against a 'legal' claim." 1 D. Dobbs, *Law of Remedies*, § 2.1(3), at 66 (2d ed. 1993).

[6] *See, e.g.*, Defendants' Reply to Plaintiff's Response to Defendants' Motion to Dismiss and to Defendants' Response to Plaintiff's Motion for Summary Judgment at 4 (noting that "the Sereboffs never attempted to recover medical payments as part of their recovery. . . . . Counsel specifically told MAMSI that they should negotiate separately for the reimbursement of any monies due and owing MAMSI. . . . There is no double recovery under the circumstances of this case.")

[7] *See, e.g.*, Appellants' Brief 10-11 (arguing that "if the relief sought by MAMSI is an 'equitable remedy,' it would require . . . a District Court Judge to hold an evidentiary hearing and determine the equities involved in the reimbursement if it is to take place. . . . Only then could a court make a determination that in 'good conscience' the plaintiff was to be deprived of his/her personal injury damages.").

[8] The district court's failure to consider any equitable factors constitutes conclusive evidence that it viewed MAMSI's action as requesting relief for contract breach and *not* for the violation of any *equitable* subrogation rights. Of course, this is only a threshold

II. THE EQUITABLE REMEDIES OF CONSTRUCTIVE TRUST AND EQUITABLE LIEN ARE NOT AVAILABLE TO MAMSI.

A. MAMSI Cannot Meet the Tracing Requirements for Equitable Restitution.

As explained by this Court in *Great West*, equitable restitution and legal restitution are distinct doctrines. *See Great West*, 534 U.S. at 212-13 ("'[R]estitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case,' and whether it is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought.") While they share the same justification (*i.e.*, a desire to avoid unjust enrichment), they result in different forms of relief. A plaintiff seeking legal restitution could obtain a personal judgment whereas a plaintiff seeking equitable restitution would obtain the right to specific property (a constructive trust) or a security interest in specific property (an equitable lien).

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question. The second question—which is addressed in Section II, *infra*—is whether or not the relief that MAMSI sought for this contract breach (*i.e.*, a constructive trust or equitable lien) was typically available in equity. If this Court ultimately decides that MAMSI has sought relief that was typically available in equity, Petitioners have argued that such relief is not "appropriate" because, *inter alia*, the MAMSI plan disclaimed the "make-whole" doctrine and provided for first dollar recovery. Pet. Br. 30-35. According to MAMSI, this second argument is "not properly before the Court because, even if the argument could be made to apply, it addresses only the amount of the recovery, not whether a court could grant a recovery at all." Resp. Br. 31. MAMSI is wrong. If "appropriate equitable relief" for the violation of a plan provision requires a federal court to consider factors other than the text of the plan, Petitioners are entitled to remand. The fact that MAMSI would still be entitled to bring its action does not take this argument out of the scope of the question presented. It merely means that Petitioners would not be entitled to a complete reversal.

1. The constructive trust and equitable lien were developed by equity courts to permit restitution of traceable property that was taken from the plaintiff.

During times of the divided bench, a plaintiff could seek *equitable* restitution when a personal judgment was undesirable. Customarily, this occurred either when: (1) the defendant was insolvent or (2) the property had been transferred to a third party. In the first of these situations (*i.e.*, an insolvent defendant), a personal judgment was undesirable because the plaintiff would likely be unable to collect the full amount. *See* 1 Dobbs, at 157 ("The constructive trust has great advantages, one of which is to permit the plaintiff to recover the fund without sharing it with any other creditors, because in the eyes of equity it is his."). In the second of these situations (*i.e.*, transferred property), a personal judgment against the defendant was often undesirable because the plaintiff desired return of the specific property. This could only be accomplished through an equitable remedy.[9]

Because equitable restitution permitted a plaintiff to recover specific property both (i) prior to other creditors and (ii) from third parties, strict tracing rules developed so as to justify the powerful preference that the plaintiff was requesting. "Indeed, a major reason for the rules requiring tracing is to avoid the unfairness that results to creditors of the defendant and other innocent persons when a preference is invoked without justification." 1 Dobbs, at 593.

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[9] Even if the plaintiff merely wanted monetary compensation for the property that had been transferred to the third party, a personal judgment against the defendant would be unsatisfactory if the defendant were insolvent or merely judgment-proof. In such a case, equitable relief was required so that the plaintiff could recover from the third party.

2. The money in Petitioners' investment account cannot be traced to MAMSI.

As explained in Petitioners' opening brief:

> MAMSI's claim is not for return of particular money that the Plan paid to the Sereboffs and that the Sereboffs still retain. . . . [A]ny money that the Plan paid on behalf of the Sereboffs has already been spent on legitimate medical expenses. What MAMSI is seeking, therefore, is not the return of Plan money or profits from its use or exchange. Rather, MAMSI is seeking to recover new money paid out by third parties, the alleged tortfeasors.

Pet. Br. 20.

MAMSI and its *amici* do not dispute this characterization of MAMSI's claim. Nor could they. Instead, they argue that "[n]o rule of equity requires the plan to show that its payments of benefits can be traced through petitioners' tort recovery from a third party and into petitioners' investment accounts." U.S. Br. 16. Unsurprisingly, neither MAMSI nor its *amici* cite *a single case* in which a constructive trust or equitable lien was imposed as *restitution* for a breach of contract.[10] Instead, they cite authorities that fall into two distinct areas, neither or which has any relevance to whether equitable restitution is available in this case.

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[10] As Petitioners expressly conceded in their opening brief, a constructive trust or an equitable lien may be granted in simple breach of contract cases in limited areas. Pet. Br. 9 n.4. These rare situations, however, all involve property that can be traced back to the plaintiff. *See e.g., Matthews v. Crowder*, 111 Tenn. 737 (1902); *Clark v. McCleery*, 115 Iowa 3 (1901).

First, they cite a litany of equitable subrogation cases[11] for the proposition that a "full-circle theory of tracing, if adopted in the subrogation context, would instantaneously destroy the entire doctrine of equitable subrogation because, by definition, the recovery from the third-party wrongdoer is never the same *res* of funds used to satisfy the claim." Resp. Br. 27.

These authorities provides no support for MAMSI because they are directed at a straw man. Petitioners do not contend—and have never suggested—that "full circle" tracing is required in the equitable subrogation context. As explained above, MAMSI's claim is one for contractual reimbursement, not equitable subrogation. Professor Laycock, one of the experts on restitution relied on by MAMSI, provides an excellent explanation regarding why equitable subrogation had a different set of tracing rules from other claims of equitable restitution:

> Subrogation may be thought of as a tracing remedy [where a]n identifiable asset—typically a claim or lien against an alleged wrongdoer or common debtor—is transferred to plaintiff. But subrogation differs from more conventional tracing claims in

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[11] *Blaauwpot v. Da Costa*, 1 Eden 130, 28 Eng. Rep. 633 (Ch. 1758) (Resp. Br. 14, 16, 17, 27); *Comegys v. Vasse*, 1 Pet. 193 (1828) (Resp. Br. 13, 16, 27; U.S. Br. 14); *Gracie v. New-York Ins. Co.*, 8 Johns. 237 (NY 1811) (Resp. Br. 13, 14, 16, 17); *Hall & Long v. Railroad Cos.*, 80 U.S. (13 Wall.) 367 (1871) (U.S. Br. 12); *Leonard v. Nye*, 125 Mass. 455 (Mass. 1878) (Resp. Br. 14); *Monmouth County Mut. Fire Ins. Co v. Hutchinson*, 21 N.J. Eq. 107 (N.J. Ch. 1870) (Resp. Br. 14, 17, 20) (U.S. Br. 13); *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio St. 382 (Ohio 1872) (Resp. Br. 17); *Randal v. Cockran*, 1 Ves. Sen 98, 27 Eng. Rep. 916 (Ch. 1748) (Resp. Br. 13, 20) (Subrogation Professionals Br. 10, 11). *See also* 4 G. Palmer, Law of Restitution, 23.18(d), at 470 (Resp. Br. 15); 2 W. Phillips, Treatise on the Law of Insurance 1723, at 397 (5th ed. 1867) (Resp. Br. 14); 8 G. Couch, Cyclopedia of Insurance Law 2002, at 6606 (1931) (Resp. Br. 14).

> that the asset acquired by subrogation was not in any sense taken from the plaintiff.

D. Laycock, *Modern American Remedies* (1st Ed. 1985), at 574 (emphasis added).

Second, MAMSI and its *amici* collectively cite five equitable lien cases.[12] *See, e.g.*, Resp. Br. 28 ("Nor has petitioners' cramped interpretation of traceability ever been the rule in other, similar contexts. In *Barnes v. Alexander*, the fund received from the third-party defendant obviously did not find its source in the attorney's own bank account.") (citation omitted); U.S. Br. 16, 17 ("This Court's decision in *Barnes* illustrates [that t]he plan does not have to trace the funds petitioners received in settlement back to the funds the plan paid for medical expenses.").

Again, these authorities are directed at a straw man. Petitioners do not contend—and have never suggested—that any tracing was historically required when an equitable lien was imposed *by agreement*. Petitioners' argument is merely that an equitable lien—when predicated on a theory of *equitable restitution*—requires tracing.

B. The Boilerplate Reimbursement in the MAMSI Plan Is Insufficient to Constitute an Equitable Lien by Assignment.

Equitable restitution was the only theory advanced by MAMSI and relied upon by the lower courts. Equitable assignment is a new theory advanced by MAMSI and the United States in this Court to justify the imposition of an

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[12] *Barnes v. Alexander*, 232 U.S. 117 (1914) ("*Barnes*") (Resp. Br. 23, 24, 25, 28; U.S. Br. 11, 16, 21, 23; Central States Br. 20); *Walker v. Brown*, 165 U.S. 654 (1897) ("*Walker*") (U.S. Br. 11, 23); *Wylie v. Coxe*, 56 U.S. 415 (1853) ("*Wylie*") (Central States Br. 20, 21); *Peugh v. Porter*, 112 U.S. 737 (1885); and *Fourth St. Nat'l Bank v. Yardley*, 165 U.S. 634 (1897).

equitable lien. As with equitable restitution, however, reliance on the theory of equitable assignment is unavailing. MAMSI and its *amici* present absolutely no evidence to the contrary.

1. An equitable lien by assignment required more than a contract to pay out of a specific fund.

At equity, it was hornbook law that, "[a] covenant by a debtor to pay certain debts out of a particular fund, when the same should be received, is merely a personal covenant." Leonard A. Jones, *A Treatise on the Law of Liens: Common Law, Statutory, Equitable and* Maritime, § 48, at 34 (1914) (citing *Rogers v. Hosack*, 18 Wend. 319). According to this Court:

> [A] mere agreement to pay out of such fund is not sufficient. Something more is necessary. ***There must be an appropriation of the fund*** *pro tanto*. . . . For a breach of the agreement, the remedy was at law, not in equity.

Trist v. Child, 88 U.S. 441, 446 (1874); *see also Gibson v. Stone*, 28 How. Pr. 468, 43 Barb. 285 (N.Y. 1865) ("All that [defendants] have said in the letters . . . amounts [] to a promise to hold the goods in trust for the benefit of the plaintiffs, and to pay the proceeds to them, giving to the plaintiffs no equitable assignment."); *Wright v. Ellison*, 68 U.S. 16 (1863); *Christmas v. Russell*, 81 U.S. 69 (1871); *Dillon v. Barnard*, 88 U.S. 430 (1874); *Williams v. Ingersoll*, 89 N.Y. 508 (Ct. App. NY 1882); *Morton v. Naylor*, 1 Hill 583 (NY 1841); *Hauselt v. Vilmar*, 2 Abb. N. Cas. 222 (NY 1877).

2. The plan's reimbursement provision is nothing more than a contract to pay a debt out of a specific fund.

The boilerplate plan language in this case cannot satisfy the strict appropriation requirements required in order to constitute an equitable lien by assignment. Petitioners did not relinquish their interest in the settlement funds such that the debt was directed to the fund nor did they demonstrate any intent to relinquish their interest and allow an equitable lien to attach. By accepting benefits under the plan, Petitioners merely agreed to use that fund, if it came into existence, to reimburse MAMSI. Such an agreement is personal.

The five cases cited by MAMSI are distinguishable. In particular, three of those cases involve equitable liens asserted by attorneys on recoveries that they obtained on behalf of clients who personally agreed to pay a specific percentage of any recovery.[13] These cases have long been recognized as falling within one of two narrow areas in which the typical rules regarding equitable liens by assignment were relaxed. *See, e.g., B. Kuppenheimer & Co. v. Mornin*, 78 F.2d 261, 264 (CA 8 1935) (specifically citing two of these contingency fee cases as examples of a "mellowing [of the general rules because] there are fairly good reasons for putting aside the strict requirements of the doctrine of equitable assignments [] in the case of an asserted lien by a lawyer for his fee [] for the efforts of the lawyer bring the fund into existence"); *Lone Star Cement Corp. v. Swartwout*, 93 F.2d 767, 771 (CA 4 1938) (same); *Jamison Coal & Coke Co. v. Goltra*, 143 F.2d 889, 893 (CA 9 1944) (same).

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[13] These three cases are *Barnes*, *Walker*, and *Wylie*.

III. THIS COURT SHOULD DECLINE THE INVITATION TO RESOLVE DOUBTS ABOUT REIMBURSEMENT IN FAVOR OF PERMITTING SUIT UNDER 502(a)(3).

According to the United States, "this Court should resolve any doubts about the scope of 'equitable relief' under section 502(a)(3) in favor of its availability to enforce valid plan terms. U.S. Br. 23 (arguing that Congress "surely incorporated the kind of flexibility in equitably remedying injustice that characterized the equitable side of the bench.").[14] For the reasons that follow, the presumption urged by the Solicitor General should be rejected.

A. For Good Reason, Congress Limited the Ability of Plan Fiduciaries to Seek Monetary Relief for Breach of Plan Terms.

Section 502(a)(1) of ERISA permits a plan beneficiary or participant "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1). Unlike section 502(a)(3), section 502(a)(1) does not limit the authorized remedies to "equitable" relief.[15]

There is good reason for this limitation. As the United States observes, "ERISA itself 'does not regulate the

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[14] By "valid," the Solicitor General appears to refer to any term that is not expressly prohibited by ERISA itself. As such, this argument appears to read the modifier "appropriate" completely out of the statute.

[15] Notably, section 502(g) of ERISA authorizes fiduciaries to obtain unpaid contributions, interest, and liquidated damages for certain plan violations by an employer. *See* 29 U.S.C. 1132(g) (also authorizing "such other ***legal*** or equitable relief as the court deems appropriate") (emphasis added).

substantive content of welfare-benefit plans," U.S. Br. 25 (citing *Inter-Modal Rail Employees Ass'n v. Santa Fe Ry.*, 520 U.S. 510, 515 (1997)). Consequently, ERISA plans and the United States have consistently argued that any valid plan term must trump equitable principles. *See, e.g.*, Brief of the Department of Labor in *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer Poirot & Wansbrough,P.C.*, http://www.dol.gov/sol/media/briefs/bombardier-9-11-03.htm (last accessed on March 21, 2006) ("If the terms of the plan expressly provide for full reimbursement from third-party recoveries and disclaim responsibility for attorney fees and costs incurred in the pursuit of those recoveries, the terms of the plan should override any "common fund" doctrine that may otherwise be available at state or federal common law.") (citation omitted).[16] The limitation of available relief in section 502(a)(3) to those types that are both "equitable" and "appropriate" serves as an essential judicial check.

B. There Is No Evidence That Congress Intended Plan Reimbursement Provisions to Be Enforceable Under ERISA.

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[16] "ERISA plans and their insurers [] pursue a rule of absoluteness—they seek reimbursement without regard to the situation of the plan member." Roger M. Baron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer Law Review 595, 623 (2004). *See, e.g., Mcintosh v. Pacific Holding Co.*, 992 F.2d 882, 885 (CA 8 1993), *cert denied*, 510 U.S. 965 (1993) (permanently disabled plan member required to pay entire $250,000 personal injury recovery to ERISA plan as reimbursement for payment of medical bills); Michelle Andrews, "Adding Insult to Injury," Smart Money Magazine, July 2000, at 130 (providing additional examples).

Despite the conspicuous absence of any mention of subrogation[17] or reimbursement[18] in ERISA, MAMSI and its *amici* intimate that Congress could not possibly have intended that section 502(a)(3) fail to provide a remedy for the clear violation of a plan reimbursement clause. Of course, neither MAMSI nor its *amici* point to *any* evidence that Congress intended the phrase "other appropriate equitable relief" to authorize breach of contract lawsuits for reimbursement.

"Congress enacted ERISA against the background of a long common law history that prohibited subrogation actions by an insurer to recover medical expenses." ATLA Br. 12; *see also* Pet. Br. 28 n.15. At present, some states (either by statute or common law) continue to *categorically* prohibit reimbursement of advanced medical expenses.[19] Moreover, "the overwhelming majority of states that [do] allow reimbursement have adopted the made-whole doctrine." ATLA Br. 28 (citing Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in*

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[17] "ERISA says nothing about subrogation provisions. ERISA neither requires a welfare plan to contain a subrogation clause nor does it bar such clauses or otherwise regulate their content." *Member Servs. Life Ins. Co. v. Am. Nat'l. Band & Trust Co.*, 130 F.3d 950, 958 (10th Cir. 1997) (*quoting Ryan v. Fed. Express Corp.*, 78 F.3d 123, 127 (3d Cir. 1996)).

[18] "Congress in providing civil enforcement remedies for plan fiduciaries under ERISA, made no provision for [] reimbursement, as it has in other statutes." ATLA Br. 11 (comparing ERISA to 42 U.S.C. §§ 2651-2653 and 42 U.S.C. § 1395y). *See also* Pet Br. 32 n.17.

[19] *See e.g., Kan. Admin. Regs.* 40-1-20 ("An insurance company shall not issue contracts of insurance in Kansas containing a 'subrogation' clause applicable to coverages providing for reimbursement of medical, surgical, hospital or funeral expenses."); *Allstate Ins. Co. v. Reitler*, 628 P.2d 667, 670 (Mont 1981) (reimbursement of medical payments void as matter of public policy); *Maxwell v. Allstate Ins. Cos.*, 728 P.2d 812, 815 (Nev. 1986) (same).

the Mystery of Insurance Subrogation, 70 Mo. L. Rev. 723 (2005)).

In sum, the limitations placed by Congress on the ability of fiduciaries to seek legal relief to enforce plan terms coupled with the omission of any reference to reimbursement in the text or legislative history of ERISA counsel against a presumption that Congress intended to endow plan fiduciaries with unbridled discretion to write reimbursement provisions and then seek contract damages for their breach.

IV. THE MISGUIDED POLICY ARGUMENTS ADVANCED BY MAMSI AND ITS AMICI SHOULD BE ADDRESSED TO CONGRESS.

Although MAMSI pays lip service to the notion that policy arguments regarding the propriety of reimbursement must be directed to Congress,[20] the thrust of the opposition to Petitioners' position is grounded in notions of policy.[21]

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[20] "[I]n the final analysis, it is important that policy arguments 'be directed to [a plan's] trustees, or to Congress, rather than to the federal courts.'" Resp. Br. 33-34 (citing *Kress*, 391 F.3d, at 570). At this very time, Congress is considering the controversial policy issue presented by this case. ATLA at 14 (discussing the Pension Protection Act of 2005, H.R. 2830, 109th Cong., 307 (2005)).

[21] For example, MAMSI and its *amici* go to great lengths to argue that Petitioners' interpretation of "appropriate equitable relief" would leave ERISA plans without an adequate way to obtain legitimate reimbursements. Of course, Petitioners disagree with this contention. Nonetheless, the answer is largely academic because the mere absence of an adequate alternative remedy cannot convert a legal claim into an equitable one. Under settled law, ERISA plan beneficiaries often lack a remedy when plan terms are violated by fiduciaries. If Congress wishes to provide a legal remedy for certain plan violations, it is free to do so.

In any event, the policy arguments advanced by MAMSI and its *amici* are misguided. In reality, permitting ERISA plans to enforce contractual reimbursement provisions is inconsistent with fundamental principles behind ERISA. Such a result would fail to protect beneficiaries and would substantially threaten to undermine Congress's deliberate decision in ERISA to leave the regulation of insurance to the states.

Permitting contractual reimbursement under ERISA is likely to substantially harm injured beneficiaries while creating limited, if any, savings for others. Most tort plaintiffs, particularly the seriously injured, do not receive full compensation in the tort system. Many of the reasons for this fact are set forth in the amicus brief filed by the Association of the Trial Lawyers of America. *See, e.g.*, ATLA Br. 16-17 (discussing the limits of tortfeasors liability insurance); *id.* (discussing the uncertainty and cost of litigation to verdict); *id.* at 21-22 (discussing state law restrictions on the collateral source rule); *id.* at 23 (discussing state law damages caps and state law limitations of liability based upon comparative fault). Put simply, conjectural claims regarding whether (and to what extent) reimbursement recoveries will reduce premiums and incrementally benefit other beneficiaries cannot overcome the undeniably harsh treatment of the majority of seriously injured beneficiaries. That position truly is insurance running in reverse.

Finally, permitting contractual reimbursement under section 502(a)(3) is also likely to seriously undermine state insurance regulation. As noted by the United States, "[s]tate laws limiting reimbursement may of course apply to insured ERISA plans if those state laws are directed to insurance." U.S. Br. 26 n.11 (citations omitted). By permitting self-funded plans—many of which purchase stop-loss coverage—to seek unrestricted contractual

reimbursement, MAMSI's interpretation of section 502(a)(3) permits insurance companies to use ERISA to contract around the ubiquitous state-law limitations on reimbursement. Particularly for these commercial insurers, the proposition that reimbursement recoveries will redound to the benefit of policyholders (in the form of reduced premiums) as opposed to increased dividends and/or executive compensation is far from obvious.[22]

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[22] For the year 2002, at least 1,924 insurance executives had compensation exceeding $600,000 per year, with more than 267 executives having annual compensation in excess of $1,500,000 and ninety-four executives with annual compensation exceeding $5,000,0000. 30 The Insurance Forum 229 (August 2003) *See also In Hot Pursuit of the Reimbursement Cases*, 5, 21 Barrister, issue No. 216, May/June 2004.

CONCLUSION

For the above reasons, Petitioners respectfully request this Court to reverse the judgment of the court of appeals.

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Respectfully Submitted,

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